IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~NO. 870~~ 70-27

ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

v.

CLINTON E. FOSTER, As Prosecuting Attorney of Bay County, Florida; M.J. "DOC" DAFFIN, as Sheriff of Bay County, Florida; and THE HONORABLE W.L. FITZPATRICK, as Circuit Judge of the Fourteenth Judicial Circuit in and for Bay County, Florida,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

APPELLANT'S BRIEF

ROBERT EUGENE SMITH
Suite 507
The Alex. Brown & Sons Bldg.
102 W. Pennsylvania Avenue
Towson, Maryland 21204

Counsel for Appellant.

PAUL SHIMEK, JR.
517 North Baylen Street
Pensacola, Florida 32501

Of Counsel

The Paul M. Harrod Company, Baltimore, Maryland 21234

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Opinions Below

The memorandum opinion on July 22, 1970 (App. 308-314), of the United States District Court for the Northern District of Florida and the order dissolving the temporary restraining order is reported at *315 F. Supp. 1387*

and the memorandum opinion on September 15, 1970 (App. 512-513), of that Court denying declaratory relief and granting dismissal is not as yet reported.

Jurisdiction

The judgment of the three-judge District Court of the Northern District of Florida dissolving the temporary restraining order, issued by His Honor, Judge Arnow, was entered on July 22, 1970 (App. 308-314). The judgment of the three-judge District Court denying declaratory relief and dismissing the action brought by Robert Mitchum was entered on September 15, 1970, (App. 512-513). A notice of appeal to this Court was filed in that Court on August 21, 1970, (App. 503).

The jurisdiction of this Court to review that decision is conferred by *28 U.S.C. 1253*, there having been an order denying injunctive relief in a civil action required by Congress to be heard and determined by a District Court of three judges.

On May 3, 1971 this Court noted probable jurisdiction.

Questions Presented

1. Does the *Federal Anti-Injunction Statute, Title 28, U.S.C. Section 2283*, bar injunctive relief against state executive and judicial action where there is a denial of constitutional freedoms in violation of the provisions of *Title 42, U.S.C., Section 1983* (Civil Rights Act) and where a disseminator of *First Amendment* materials is forbidden to continue dissemination under an arbitrary finding of obscenity

of a small amount of publications and of nuisance thereby producing great and immediate irreparable injury through bad faith enforcement of state laws.

Statutory Provisions Involved

Section 847.011, Florida Statutes Annotated provides:

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind,

giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or *who in any manner knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, or both.* A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles, or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in possession, custody, or control any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent

immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding $500,00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be made by showing that at the time such act was committed or conduct engaged in he

had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knolwedge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(6) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer, of any claimant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final

hearing or further order of the court. Whenever the relator state attorney, county solicitor or county prosecuting attorney shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this

subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with anh of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorney shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition of motion picture films permitted by § 521.02.

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person ncludes individuals, firms, associatjons, corporations, and all other groups and combinations.

823.05 Places declared a nuisance; may be abated and enjoined.

Whoever shall erect, establish, continue, or maintain, own or lease any building, booth, tent or place which

tends to annoy the community or injure the health of the community, or become manifestly injurous to the morals of manners of the people as described in § 823.01, or shall be frequented by the class of persons mentioned in §856.02, or any house or place of prostitution, assignation, lewdness or place or building where games of chance are engaged in violation of law or any place where any law of the state is violated, shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures and contents are declared a nuisance. All such places or persons shall be abated or enjoined as provided in §§ 64.11-64.15.

60.05 Abatement of nuisances.

(1) When any nuisance as defined in § 823.05, exists, the state attorney, county solicitor, county prosecutor, or any citizen of the county may sue in the name of the state on his relation to enjoin the nuisance, the person, or persons maintaining it and the owner or agent of the building or ground on which the nuisance exists.

(2) The court may allow a temporary injunction without bond on proper proof being made. If it appears by evidence or affidavit that a temporary injunction should issue, the court, pending the determination on final hearing may enjoin:

(a) The maintaining of a nuisance;

(b) The operating and maintaing of the place or premises where the nuisance is maintained;

(c) The owner or agent of the building or ground upon which the nuisance exists;

(d) The conduct, operation or maintenance of any business or activity operated or maintained in the building or on the premises in connection with or incident to the maintance of the nuisance.

The injunction shall specify the activities enjoined and shall not preclude the operation of any lawful buisness not conducive to the maintenance of the nuisance complained of. At least three days' notice in writing shall be given defendant of the time and place of application for the temporary injunction.

(3) Evidence of the general reputation of the alleged nuisance and place is admissible to prove the existence of the nuisance. No action filed by a citizen shall be dismissed unless the court is satisfied that it should be dismissed. Otherwise the action shall continue and the state attorney or county solicitor notified to proceed with it. If the action is brought by a citizen and the court finds that there was no reasonable ground for the action, the costs shall be taxes against the citizen.

(4) On trial if the existence of a nuisance is shown, the court shall issue a permanent injunction and order the costs to be paid by the persons establishing or maintaining the nuisance and shall adjudge that the costs are a lien on all personal property found in the place of the nuisance and on the failure of the property to bring enough to pay the costs, then on the real estate occpuied by the nuisance. No lien shall attach to the real estate of any other than said persons unless five days' written notice has been given to the owner or his agent who fails to begin to abate the nuisance within said five days.

Title 28, U.S.C., Section 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Statement

Robert Mitchum, hereinafter called Mitchum, is the owner-operator of the sole proprietorship trading as THE BOOK MART in the City of Panama City, Florida. He was engaged in the sale and offering for sale of books, magazines, newspapers, and the showing of films and other matters presumptively protected under the *First Amendment* to the *Constitution of the United States.* This dissemination is conducted in a controlled adults only atmosphere.

Clinton E. Foster, hereinafter called Foster, is the Prosecuting Attorney in and for Bay County, Florida, M.J. "Doc" Daffin is the Sheriff of Bay County, Florida. W.L. Fitzpatrick, hereinafter called Judge Fitzpatrick, is a Circuit Judge in and for Bay County, Florida.

Foster, on March 30, 1970, filed a complaint in the Circuit Court of Bay County, a Court of original jurisdiction, before Judge Fitzpatrick seeking a temporary injunction against Mitchum (App. 27-33), to prevent the continuance of the operation of the book store alleging it to be a nuisance. A subpoena duces tecum issued requiring Mitchum to appear before and present to Judge Fitzpatrick on April 3, 1970 a copy of every book, magazine, periodical and pamphlet offered for sale at the place of business, (App. 34-38). Mitchum complied. Foster merely selected 25 publications

and introduced them as evidence in this civil proceeding (App. 52-55). A police officer testified that the 25 publications in his opinion were obscene and that many people wanted THE BOOK MART extricated from the community (App. 57-60, 64-65). Three days later on April 6, 1970 Judge Fitzpatrick found only 6 of the selected publications obscene (App. 73). Based upon this finding he additionally found that the mere conducting of the business constituted a nuisance, (App.74), and consequently issued an order enjoining the operation of the book store effectively causing the cessation of dissemination (App. 75). Mitchum immediately perfected an interlocutory appeal to the First District Court of Appeals. (App. 76-77, 266-272). However, both Judge Fitzpatrick (App. 76), and the Appellate Court denied supersedeas, *244 So. 2d 154*, (App. 78-80), which would have stayed this order pending appeal.

Mitchum, unable to obtain relief and under penalty of contempt if dissemination resumed, on April 30, 1970, filed a complaint in the United States District Court (App. 8-27), seeking injunctive relief from Judge Fitzpatrick's order. Winston E. Arnow, District Judge, hereinafter called Judge Arnow, issued a temporary restraining order on May 12, 1970, over one month after closure of the business, prventing Foster and Daffin from enforcing Judge Fitzpatrick's order except as to the sale of that material found to be proscribable following a judicially supervised adversary hearing held pursuant to due notice (App. 85-88, 113-116).

Mitchum then physically removed all copies of the publications ruled by Judge Fitzpatrick to be obscene and relying upon the District Court order again commenced dissemination. However, on May 29, 1970, Judge Fitzpatrick issued an order directing Mitchum to show cause why he and

his employees should not be held in contempt of court for resuming the operation of the business (App. 117-121), in violation of his order of April 6, 1970.

Mitchum then filed an amended complaint before Judge Arnow seeking to name Judge Fitzpatrick as a party (App. 106-107). Judge Arnow on June 5, 1970 issued the second temporary restraining order, preventing Judge Fitzpatrick from proceeding upon the contempt and preventing Judge Fitzpatrick from ordering the business closure, however, he did not prevent any contempt proceeding against Mitchum for distribution of any material that was determined to be proscribable following a judicially superintended adversary hearing held pursuant to due notice (App. 131-134).

Judge Fitzpatrick, on June 19, 1970 held another hearing, where Mitchum and 228 publications were subpoenaned (App. 145-146, 149-162). Foster introduced them into evidence. Without any evidence as to contemporary community standards, redeeming social value or prurient interest (App. 146), Judge Fitzpatrick on June 26, 1970, found 80 of these publications obscene, (App. 146-147, 190-192). Judge Fitzpatrick again found the mere operation of The Book Mart was prima facie injurious and damaging to the morals and manners of the people of the State of Florida and that it constituted a nuisance (App. 146, 192). Judge Fitzpatrick ratified, confirmed and continued his April 6, 1970 order enjoining the operation of the entire business (App. 147, 192, 193). Another interlocutory appeal to the First District Court of Appeals (App. 273-279), was perfected and that Court has failed to rule on it to this date. Mitchum informed Judge Fitzpatrick of this Court's decision of *Bloss v. Dykema,* 398 U.S. 278 (1970), and notwithstanding this, Judge Fitzpatrick found the publication "Pinned, No. 1" obscene, (App.

147-148,) contrary to this Court's finding. Mitchum, at the time of this order had none of the 228 publications in The Book Mart except those found not obscene in *Bloss*, supra.

Judge Fitzpatrick ordered the seizure of all publications offered for sale by Mitchum at The Book Mart requiring them to be impounded (App. 193), and restrained and enjoined Mitchum from selling or offering for sale any publication named in his order or any other publication of the same or similar character (App. 193).

The same date, June 25, 1970, Daffin seized every magazine, book, newspaper, film and other articles for sale located on The Book Mart premises including numerous copies of the publications found to be not obscene in *Bloss*, (App. 194-251). Mitchum filed a Motion for Leave to File a Supplemental Complaint (App. 253), for relief from Judge Fitzpatrick's order of June 25, 1970 which motion was granted by Judge Arnow on July 8, 1970 (App. 280-281).

Judge Arnow scheduled a hearing before the three-judge Court on July 16, 1970 for arguments upon the further relief sought by Mitchum and the dissolution of Judge Arnow's order by the state authorities.

The three-judge panel entered an order denying all injunctive relief and dissolved the restraints imposed by Judge Arnow (App. 308-314), on July 22, 1970. The same panel on September 15, 1970 also ordered Mitchum's complaint dismissed denying declaratory relief (App. 512-513). Mitchum filed an appeal to this Court from the denial of the injunctive relief under the three-judge statute on August 21, 1970 (App. 503).

During the proceedings in state Court before Judge Fitzpatrick, service of process had been contested and the state jurisdiction was disputed. However, since the three-judge panel decision state Court service of process has been perfected.

Summary of Argument

This Court for forty years has instructed the judiciary both state and federal that it is not possible to safeguard the precious *First Amendment* rights by permitting injunctive restraints upon the free exercise thereof utilizing overbroad statutes including nuisance statutes, *Near v. Minnesota*, 283 U.S. 697 (1931) as well as enjoining future dissemination. As so aptly put by Mr. Chief Justice Hughes, *283 U.S. 697* at 713, "This is the essence of censorship."

There are extensive parallels in *Near* and the case presently before the Court. Both were subject of a civil nuisance statute enforceable by injunction and contempt proceedings permitting prior suppression of future dissemination. Also both were subjected to preliminary injunctive sanctions.

With this clear mandate, followed from that time forward in multiple decisions, we find a state Court operating under a strikingly similar statute invoking the remedies found to be so abhorrent in *Near*.

The Florida Appellate Court also declined to follow *Near* and its progeny and refused to prevent the denial of these constitutional freedoms by the lower state court.

This is not a case involving a first impression principle that could have been resolved in state court. Clearly the opposite is true. Yet when faced with this clearly decided principle of law Mitchum was denied relief based upon *Title 28, U.S.C. Section 2283* (The Federal Anti-Injunction Statute). With all the ample evidence before the three-judge court revealing irreparable injury, bad faith enforcement of the law and refusal of a state court to follow the dictates of this Court in *Near* as well as *Bloss*, that Court found the statute a bar to equitable relief under *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281.

The Florida statutes involved herein have been previously upheld in the Florida Courts; *Section 847.011, F.S.A., State v. Reese*, 222 So. 2d 732 and *Martin v. Contey, NO. 40159*, Sup. Ct. 5/26/71; *Section 823.05, F.S.A., Lanski v. State*, 199 So. 46 and *Merry Go Round, Inc. v. State*, 186 So. 538; *Section 60.05, F.S.A., Merry Go Round Inc. v. State*, 186 So. 538, and *Lanski v. State*, 199 So. 46 and the First District Court of Appeals has apparently sanctioned the state actions taken below, *244 So. 2d 154.*

The Florida Courts reveal no propensity whatsoever to follow either the Federal Constitution or the dictates of this Court. Yet to follow the fruitless state Court procedures the final adjudication may take years in coming and then only from this Court.

To deny relief here is tantamount to no relief in the Courts of Florida no matter how excessive or unconstitutional the measures taken by enforcement authorities.

Argument

Appellant was brought before the Bay County, Florida Circuit Court where he was ordered to and did produce a copy of each item of *First Amendment* material offered for sale in his book store. The state prosecutor merely selected 25 publications and utilized the testimony of a police officer to ostensibly prove obscenity. The trial judge even with this limited evidence only found 6 of the publications proscribable. Had this been the total result appellate review may have been adequate.

At this juncture though, the Court then held the Appellants entire business operation to be a nuisance and enjoined further operation. The Appellate Courts refused to intervene and grant Mitchum relief. Mitchum faced with this situation repaired to Federal Court and over a month later obtained only such relief as to permit him to commence dissemination. Mitchum removed all copies of the 6 publications found proscribable by the state Court but this did not deter the State authorities for they again required Mitchum to appear in state Court to show cause why he should not be held in contempt for opening his book store. Mitchum then brought the State Court Judge into the federal proceeding as a party, however, this did not deter them, for they again brought Mitchum before the State Court with 228 publications. Judge Fitzpatrick found 80 of them proscribable and again ordered the book store closed as a nuisance. Mitchum also appealed this second injunction to the First District Court of Appeals on Supersedeas. That Appellate Court has yet to rule upon the appeal since filed in June of 1970.

Historically speaking the Florida Courts have not been shown as inclined to accord *First Amendment* freedoms their proper safeguards.

As an example we can review several of their Appellate decisions: In the case of *Reese v. State*, 222 So. 2d 732 it was held that the state could also appeal an adverse decision in a civil censorship proceeding and also held that subsequent decisions of this Court including *Memoirs v. Attorney General*, 383 U.S. 413, did not provide a clear modification of *Roth v. U.S.*, 354 U.S. 476 and possessed:

"... no dignity as ... judicial precedent."

and that the redeeming social value test was merely so much

"hocus-pocus phrases" at pp. 738.

The *Reese* Court also upheld the Florida statute acknowledging that it proscribed possession of obscene materials, pp. 733, contravening *Stanley v. Georgia*, 394 U.S. 557 yet found that possession with intent to sell was valid, pp. 735 - 736 since it could take place in a:

> "school classroom, a hotel lobby, a public park – or *the appellee's bedroom*." (emphasis supplied).

In another matter styled *South Florida Arts Theaters v. State*, 224 So. 2d 706 (Fla. 4th D.C.A., 1969), cert denied 229 So. 2d 871 (Sup. Ct. Fla. 1969) *ex parte* injunctions without notice were upheld notwithstanding *Near*, supra, and *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175.

Time is another factor weighing against the vindication of *First Amendment* freedoms. In *Felton v. City of Pensacola*, 200 So, 2d 842 (D.C.A. 1st), the matter was adjudged in trial court February 28, 1966. The First District Court of Appeals (also the same Appellate Court as the one at bar) did not render its decision until July 6, 1967 more than 8 months after oral argument. Ultimately reaching this Court the judgment was reversed 390 U.S. 340 on March 11, 1968, over 2 years after the lower court judgment. Again in *Nissinoff v. Harper*, 212 So. 2d 666 the trial judgment was entered on March 14, 1967. The Court of Appeals did not set oral argument until more than 2 months after all briefs were submitted and did not render a decision until July 11, 1968 or more than a year and three months after trial judgment.

The trial judge herein declined to follow the principles of this Court set down in *Near* and the Appellate Court refused relief. Upon the second order the trial judge found a publication proscribable contrary to this Court's holding in *Bloss v. Dykema*, supra, which decision was given to the Court for consideration. Relief from this order also has not been forthcoming from the Appellate Court.

The totality of the circumstances herein as well as the actions taken by these enforcement authorities cannot be deemed anything but "bad faith enforcement" and from the judgments and orders with their result amply show great and immediate irreparable injury. For not only is this a prior restraint but a total suppression.

In this setting there can not conceivably be a bar to relief by virtue of the Anti-Injunction Statute. This is not a case where defense of a single prosecution brought in good faith would be justified.

This Court has not ruled that *Title 28, U.S.C. Section 2283* bars injunctive relief in all circumstances but has recognized that Equity will grant relief in appropriate circumstances, *Younger v. Harris*, 401 U.S. ____; *Perez v. Ledesma*, 401 U.S. ____; and *Byrne v. Karalexis*, 401 U.S. ____.

Appellant herein avers that the instant case involves both the exception (1) expressly authorized by Congress under *Title 42, U.S.C.A. 1983* as well as (3) to protect or effectuate its judgments, should a Declaratory Judgment issue.

The United States Supreme Court in *Dombrowski v. Pfister*, 380 U.S. 479, stated:

> "We therefore find it unnecessary to resolve the question whether suits under *42 U.S.C. 1963 (1953 ed)* come under the 'expressly authorized' exception to Section 2283."

And *Cameron v. Johnson*, 381 U.S. 741, was remanded for reconsideration in the light of criteria enunciated in *Dombrowski* directing the lower court's attention to N.2. When the case reached the Supreme Court again in *Cameron v. Johnson*, 390 U.S. 611 and N.3 on page 613 decided in April, 1968 it was noted the lower court found *42 U.S.C. 1983* created no exception to *Title 28, U.S.C.A. 2283.* Commenting upon this finding, this Court stated:

> "We find it unnecessary to resolve either question and intimate no view whatever upon the correctness of the holding of the District Court."

Although there have been no authoritative ruling upon this point it may be noted that the Civil Rights statute

originated in 1871 and was promulgated to ensure federal enforcement to secure the citizens their rights, privileges and immunities secured by the constitution and laws of the United States and to implement the Supremacy clause of the Federal Constitution. The Anti-Injunction statute does not constitute an implied repeal or restriction of the Civil Rights Statute. In addition the Anti-Injunction statute conforms with it by providing that there should be certain exceptions if granted by Congress.

The exception (3) to protect or effectuate its judgments is also appropriate in the instant case. Whereas, should the United States District Court not dismiss the case at bar, as Appellant has shown it shouldn't, how then could the Court protect or effectuate its judgments that flow therefrom. It would be illogical for a federal court to be granted the jurisdiction and following an evidentiary hearing, be unable to fully adjudicate the issue by effectuating its judgment with an injunction.

The Supreme Court of the United States in *Dombrowski v. Pfister*, 380 U.S. 479 upheld injunctive relief granted in conjunction with its judgment:

> "These shall include prompt framing of a decress restraining prosecution . . . and prohibiting further acts . . . "

The same Court in *Cameron v. Johnson (per curiam)*, 381 U.S. 741, instructed the lower court to make certain findings and thereafter to determine whether relief was proper in light of the criteria set forth in *Dombrowski* wherein injunctive relief was ordered.

In *Zwickler v. Koota, supra* the Supreme Court stated:

> "It will be the task of the District Court on the remand to decide whether an injunction will be 'necessary and appropriate' should appellant's prayer for declaratory relief prevail."

See also *Star-Satellite, Inc. v. Rosetti*, 317 F. Supp. 1339, July 9, 1969, U.S.D.C. S.D. of Miss. where injunctive relief was granted to effectuate the court's judgment.

In *Machesky v. Bizzel*, 414 F.2d 283, the United States Court of Appeals for the Fifth Circuit stated:

> "We hold also that where important public rights to full dissemination of expression of public issues are abridged by state court proceedings, the principles of comity embodied in Section 2283 must yield, and that the district court is empowered to enjoin the state court proceedings to the extent that they violate these First Amendment rights."

The court there found that an injunction was proper to protect or effectuate its judgment.

The United States District Court for the Eastern District of Pennsylvania in the case of *Grove Press, Inc. v. City of Philadelphia, supra* also had this matter to decide:

> "As noted supra p. 284, Grove Press has requested this Court to grant it both injunctive and declaratory relief. Primarily, Grove seeks this relief for the purpose of vindicating its alleged constitutional right of freedom of expression as that right has been infringed by the pendency of the City's state equity action.
>
> . . .

> "This Court has concluded that the complaint filed by the City of Philadelphia in the state courts is on its face offensive to the constitutional rights of Grove Press. For reasons discussed below, Grove Press is therefore entitled to an injunction prohibiting the City of Philadelphia both from continuing its current civil prosecution in the state courts, and from instituting any further actions to prohibit the exhibition of the film "I Am Curious – Yellow" on the ground that such exhibition constitutes a 'nuisance'."

That court then went on to rule upon and reject the motion to dismiss filed by the city wherein they used *28 U.S.C.A. 2283* as their authority:

> "The City filed a motion to dismiss Civil Action No. 69-972 on the ground that Title 28 U.S.C. 2283 prohibits a Federal Court from enjoining pending proceedings in a state court. It is arguable that 2283 does not apply here since Grove Press is not a party to the action in the state courts. More importantly, however, although the Supreme Court as yet has not decided the question, see, Dombrowski, supra, 380 U.S. at 484, f.n. 2, 85 S.Ct. 1116, the Court of Appeals for the Third Circuit has held that 2283's prohibition does not apply where the federal court action is predicated on Title 42, U.S.C. 1983 which by its terms specifically authorizes the granting of an injunction to stay state court proceedings. See Cooper v. Hutchinson, 184 F.2d 119 (C.A. 3, 1950). Accordingly the City's motion to dismiss Civil Action No. 69-972 is denied."

See also *Anderson v. City of Albany*, (C.A. Ga. 1963), 321 F.2d 649; *City of Greensboro v. Simpkins*, (C.A. N.C. 1957), 246 F.2d 425; *Lee v. Macon County Bd. of Ed.*, (D.C. Ala. 1963), 221 F. Supp. 297; *Butler v. Crumlish*, (D.C. Pa.

1964), 229 F. Supp 565; – and also *Egan v. City of Aurora,* (C.A. Ill. 1960), 275 F.2d 377, affirmed in part, vacated in part on other grounds 365 US 514; *Basista v. Weir,* (D.C. Pa. 1964), 225 F. Supp. 619; *A.F. of L. v. Watson* (1946), 327 U.S. 582. And in particular see *Greenwood v. Peacock* (1966), 384 U.S. 808 at page 829-830.

The three-judge panel below found that injunctive relief was improper under *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers,* 398 U.S. 281. However, the Atlantic Coast Line case involved picketing where the Railway Labor Act (Title 45, U.S.C. 151) the Interstate Commerce Act and the Clayton Act (Title 29, U.S.C. 52) were involved where the Union sought federal relief some two years after the state injunctive order was in being and principally involved federal statutory claims.

Since this Court's rulings in *Atlantic Coast Line* and *Younger v. Harris,* supra, lower federal Courts have followed the dictates set out in these opinions; *Eve Productions, Inc. v. Shannon,* 439 F.2d 1073, *Veen, et al v. Davis,* No. 71-454-AAH, USDC., C.D. Cal (1971) each denying relief.

And other federal Courts have found the necessary criteria present to grant injunctive relief since these decisions. See *Board of Education v. Shelton,* U.S.D.C., N.D. Miss., decided 5/16/71; and *Taylor v. City of Selma,* U.S.D.C., S.D. Ala (3 judge) 4/8/71.

Each of these cases fully recognize that relief is obtainable upon a showing of great and immediate irreparable injury by way of harassment or bad faith enforcement of the laws.

In reviewing the history of the Anti-Injunction statute one can see that the legislation is not to be read in absolute terms preventing relief in all but cited circumstances. For instance exceptions exist as to the *Bankruptcy Act of 1867, Act of March 2, 1867, Ch. 176, Section 21, 14 Stat. 526; The Interpleader Act of 1926, 44 Stat. 416,* as amended, *28 U.S.C. 1335; The Removal Acts, 28 U.S.C. 1441-1450;* and *Title 46, U.S.C. 185* limiting shipowner liability or where the federal government sought the injunctions, *Leiter Minerals Inc. v. U.S.*, 352 US 220.

Similarly an exception exists where a denial of equitable federal relief would be tantamount to forcing a citizen to undergo irreparable injury where the injury was both great and immediate at the hands of state authorities through harassment or bad faith enforcement of the laws, *Younger v. Harris; Perez v. Ledesma;* and *Byrne v. Karalexis,* supra, adhered to in *Board of Education v. Shelton;* and *Taylor v. City of Selma,* supra.

It is appropriate at this time for this Court to reverse the decision of the three-judge panel and delineate that where state courts and state enforcement authorities suppress constitutionally guaranteed freedoms contrary to the established holdings of this Nation's highest Court to the immediate irreparable injury of citizens of the United States through bad faith enforcement or harassment the federal judiciary must grant relief. For to do otherwise Mitchum and any other citizen faced with this type situation would be given effective relief only after years of state litigation. In addition, it would take an individual willing to give up great personal time and expense, to pursue his state remedies to the fullest, ultimately seeking relief in this Court only to find that vindication came too late in dissemination which by nature is

perishable by time. This is particularly true in *First Amendment* material where a July 1970 issue can finally lawfully be disseminated in July 1971.

Conclusion

It is an elementary principle of law that United States Supreme Court decisions are the law of the land. All lower federal and state Courts and enforcement authorities are bound by them.

In the face of this Court's decision of *Near v. Minnesota*, some forty years ago the prosecutional authorities and the Courts of the State of Florida refuse to adhere to those principles and *in futura* prohibit sales of publications at a book store determining the operation of such store was prima facie injurious to the morals and manners of the people of the State of Florida.

When Mitchum sought vindication from this injury in federal Court he was denied relief because of *Title 28, U.S.C. 2283*. The Florida Courts have consistently upheld their statutes notwithstanding *Near* and it would be futile to seek relief from them.

The pattern of conduct complained of must certainly amount to bad faith enforcement and the result obtained clearly reveals great and immediate irreparable injury necessitating federal Court intervention.

It is therefore respectfully requested that this Court grant this appeal and find that *Title 28, U.S.C. 2283* is no bar to relief and to remand this matter to the three-judge panel for the granting of the proper relief to fully vindicate these *First Amendment* freedoms as mandated by *Near* under the criteria set forth in *Younger v. Harris* and *Perez v. Ledesma*.

Respectfully submitted,

Robert Eugene Smith

Paul Shimek, Jr.

Of Counsel